STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0151

State of Minnesota,
Respondent,

vs.

Shawn Michael Tillman,
Appellant.

Filed October 12, 2020
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-17-5830

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Larkin, Judge; and Reilly, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges his sentence for indecent exposure in the presence of a minor, arguing that his offense was significantly less serious than typical and that the district court therefore abused its discretion by denying his motion for a downward durational departure. We affirm.

FACTS

Appellant Shawn Michael Tillman pleaded guilty to indecent exposure in the presence of a minor. He admitted that in July 2017, he exposed his penis and openly masturbated while in the public part of an apartment building in Ramsey County. While doing so, he approached a glass door, and a woman and her infant were on the other side of the door. Tillman could see the woman and infant, and he knew that they could see him. Tillman admitted that he had a prior gross-misdemeanor conviction for indecent exposure in the presence of a minor from June 2017. At the time of the current offense, Tillman had four prior convictions (including the one from June 2017), as well as numerous pending charges, for indecent exposure.

Tillman moved for a downward dispositional departure or a downward durational departure. At sentencing, the district court denied the downward dispositional departure. The court sentenced Tillman to 39 months in prison without expressly addressing his motion for a downward durational departure. Tillman appealed, and this court stayed his appeal so he could pursue postconviction relief.

Tillman petitioned for postconviction relief, seeking a ruling on his motion for a downward durational departure. The district court granted a hearing and acknowledged that it had not ruled on Tillman's durational-departure motion at the initial sentencing hearing. Tillman argued that a downward durational departure was appropriate because his conduct was significantly less serious than conduct in typical cases involving indecent exposure in the presence of a minor. Specifically, Tillman noted that he did not seek out a particular victim, the minor was an infant who could not understand his conduct, and his actions were not sexually motivated and instead were the result of his mental illness.

The district court denied Tillman's request for a downward durational departure, reasoning:

> In terms of the matter being less serious, I don't find that it is less serious . . . . It is different, but as to the argument that the defendant, Mr. Tillman, didn't seek out specific victims or a location, that may be the case that he was not seeking them out. . . .
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> But you don't have to be in a playground area to know that there are going to be children around. And in an apartment building, whether or not the victim here and her child were visiting or they were living there or whether they were in a common space or not, an apartment building is going to have young families, there are going to be young children. And this child, I agree with counsel, a 1-year-old or 2-year-old, is probably not going to have been damaged here, but it could have easily been a 3-year-old or a 6-year-old or a 10-year-old, and certainly there could have been other children. . . .
>
> It does appear that this is a product of Mr. Tillman's mental illness as opposed to a predatory or a sexual impulse. . . . But again, I don't see that this—I could consider this a less serious case. I think it is serious anytime, exposing yourself in front of others in an area where children likely are to be, like an apartment building. It is a little different from the other

> cases, I give counsel that, but not different enough that I could find it as less serious to grant a departure.
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> . . . .
>
> It's compelling, lost a little sleep over this, but I'm afraid I'm going to deny that motion.

This court reinstated Tillman's appeal.

D E C I S I O N

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2016). The sentencing guidelines seek to "maintain uniformity, proportionality, rationality, and predictability in sentencing" of felony crimes. *Id.* "Consequently, departures from the guidelines are discouraged and are intended to apply to a small number of cases." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A district court may depart from the presumptive sentence only when there exist "identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines 2.D.1 (2016). A durational departure must be based on factors that reflect the seriousness of the offense. *Solberg*, 882 N.W.2d at 623. A downward durational departure is justified if "the defendant's conduct is significantly less serious than that typically involved in the commission of the offense." *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985).

When substantial and compelling circumstances exist, the district court has broad discretion to depart, and we generally will not interfere with the exercise of that discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Only in a "rare" case will we reverse the district court's refusal to depart from the presumptive sentence. *Id.* When exercising

sentencing discretion, the district court "must consider circumstances supporting a downward durational departure from the presumptive sentence"; the court errs when it fails to consider "legitimate" and "significant" reasons for a departure. *State v. Curtiss*, 353 N.W.2d 262, 262-64 (Minn. App. 1984). However, the district court is not required to depart even though there are grounds to do so. *State v. Olson*, 459 N.W.2d 711, 716 (Minn. App. 1990), *review denied* (Minn. Oct. 25, 1990).

When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court's decisions using the same standard that we apply on direct appeal. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012).

The record reflects that the district court considered the reasons proffered for the departure. Indeed, Tillman does not argue that the district court failed to do so. Instead, he offers three arguments for reversal. First, Tillman reiterates the argument he presented to the district court that his offense was significantly less serious than typical because he did not seek out specific victims, the minor was an infant who could not understand his conduct, and his actions were the result of a mental illness rather than a predatory impulse. Second, Tillman contends that the district court erred by refusing to depart, despite recognizing that the circumstances were "compelling." Third, Tillman contends that the district court erred by reasoning that an older child could have seen the offense, thereby considering the potential harm rather than the actual harm caused by his conduct.

Tillman's first two arguments do not provide a basis for relief. Again, a district court is not required to depart even if there are grounds to do so. *Olson*, 459 N.W.2d at

716. As to Tillman's third argument, the district court was required to consider whether Tillman's conduct was significantly less serious than that typically involved in indecent-exposure cases. Tillman does not cite any authority indicating that, in doing so, a district court abuses its discretion by considering the potential, as opposed to the actual, harmful effects of the defendant's conduct. Even if we were to assume, without deciding, that it was improper for the district court to have considered potential harm, Tillman does not cite authority suggesting that such reasoning is a basis to reverse.[1]

Tillman compares the facts of his offense to similar offenses in other indecent-exposure cases to show that his offense is less serious, and he seems to invite this court to substitute its judgment for that of the district court. But on appeal, we review for an abuse of discretion, which occurs when the district court fails to properly apply the law or the decision is against logic and the facts in the record. *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). The record shows that the district court considered similar offenses in other indecent-exposure cases when ruling on Tillman's departure request. None of the cases that Tillman uses for comparative purposes suggests that the district court's decision is against logic and the facts in the record.

[1] This court has, in an unpublished opinion, reversed a district court's decision to *increase* a sentence within the presumptive range based on an impermissible ground. *State v. Christianson*, No. A13-0433, 2014 WL 1344203, at *6-7 (Minn. App. Apr. 7, 2014) (holding that courtroom spectator misconduct that is not attributable to the defendant is a constitutionally impermissible sentencing consideration). But we are not aware of any appellate decision suggesting that a district court abuses its discretion by relying on an improper sentencing consideration in refusing to *decrease* a sentence.

In sum, Tillman has not provided a basis for us to conclude that the district court abused its discretion by imposing a presumptive sentence. Nor is this a "rare" case in which we would reverse the district court's refusal to depart downward.

Tillman filed a pro se supplemental brief challenging conditions of release imposed by the Department of Corrections. An appellate court generally does not consider issues that were not raised in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Thus, we limit our review in this appeal to the district court's sentencing decision and the reasons proffered in support of Tillman's departure request. In making its decision, the district court was not asked to consider conditions of release that the Department of Corrections might impose. Thus, such arguments are not properly before this court on appeal.

Affirmed.